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From mobile phones to cattle: how the Court of Justice is reframing the approach to Article 101 (formerly 81 EC Treaty) of the EU Treaty

By Arianna Andreangeli*

1. Introduction

This paper considers the implications of the preliminary ruling in the case of *Competition Authority v Beef Industry Development Society and Barry Brothers Meats* (hereinafter referred to as *Barry Brothers*)¹ for the legal standards applicable to restrictions of competition ‘by object’ and analyse its wider impact on the interpretation of Article 101 TFEU (formerly Article 81 EC Treaty).² Its first part will examine whether this preliminary ruling is consistent with the existing principles governing the application of Article 101(1) EU Treaty to “restructuring deals”. The second will briefly consider the principles governing the application of Section 1 of the US Sherman Act and in the light of this examination will try to gauge the wider ramifications of *Barry Brothers* for the interpretation of Article 101 TFEU.

The paper will argue that the Court of Justice of the EU, responsive to the call for a “modernised” interpretation of this provision, applied some of the elements characterising the more flexible and “economics-principled” approach hitherto relevant for ‘by effect’ cases to the assessment of *prima facie* restrictions by object. In this respect it will illustrate that the Court, despite continuing to rely on the “dichotomy” between ‘by object’ and ‘by effect’ restrictions, scrutinised the goals and the content of the arrangement by taking into account its actual context, according to a similar pattern of analysis to that of “less serious” infringements.

The paper will conclude that the Court of Justice, in a manner which displays some similarities with the US Supreme Court’s interpretation of Section 1 of the US Sherman Act, seems now to adopt an interpretation of the prohibition clause inspired more by an idea of “continuum” between more and less serious infringements than by a relatively stark alternative between “by object” and “by effect” restrictions of competition. It will be argued that while this distinction remains relevant for the purpose of determining the consequences of individual breaches, the Court’s framework of appraisal reserves antitrust intervention only for those arrangements that are either inherently incompatible with the function of Article 101 or result in an actual impairment of competition and therefore responds to the need to place the application of Article 101(1) TFEU on more solid economic footing.

2. *Barry Brothers* and the principles governing “crisis cartels”

2.1. ‘Crisis cartels’ in the Commission and the EU Courts’ practice: summary remarks

The limited remit of this paper does not allow for a full consideration of the economic issues arising from “crisis cartels”, i.e. agreements establishing cooperation among competitors

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¹ Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers*, [2008] ECR I-8637 (hereinafter referred to also as *Barry Brothers*).

² See case C-309/99, *Wouters v Algemene Raad*, [2002] ECR I-1577; case C-519/04 P, *Meca Medina and Majcek v Commission*, [2006] ECR I-6991; case T-328/03, *O2 v Commission*, [2006] ECR II-1231.

operating in industries experiencing crisis and aimed bringing the situation “back on track”,³ for instance when a market presents excessive supply caused by the stagnation of demand.

In these cases it may be indispensable for rivals to jointly agree cuts of production if the dynamics of demand and supply cannot restore “normal” market conditions.⁴ However, since they result in concerted output reductions,⁵ these arrangements are incompatible with the guiding principle of Article 101, namely that each undertaking must be able to determine independently its conduct on the market.⁶ Accordingly, restructuring deals would only benefit from the legal exception of Article 101(3) TFEU in limited circumstances⁷ to tackle the consequences of industrial downturn and for a transient period.⁸ It must be shown that no lasting improvement can be forecast in the medium term in “normal” market conditions and that the cooperation entailed by the arrangement does not unduly restrain the freedom of the parties beyond what is strictly necessary to shed the overcapacity.⁹ In relation to the first condition of the legal exception,¹⁰ it must be demonstrated that these practices are capable of eliminating excessive capacity and, consequently, of restoring efficiency and competitiveness in the industry.¹¹ As to the second condition that the arrangement afford consumers a “fair share” of their benefits, the parties must prove that any negative impact of the arrangements is at least offset by its positive outcomes and thus overall “neutral” for consumer welfare.¹²

To satisfy the third condition of “indispensability”, it must be established that the alleged benefits of the agreement cannot be secured through any less restrictive means: the arrangement must be limited in its duration and geographic scope and must not hamper the freedom of action of the parties beyond what is required to achieve its goals.¹³ Finally, the agreement must not entail the elimination of substantial competition from the relevant market by weakening any existing rivalry to the point that the latter is no longer capable of restraining the parties’ freedom of action,¹⁴ e.g. by conferring on them significant market power and/or foreclosing the market vis-à-vis actual or potential rivals.¹⁵

In its administrative practice under the “old” Implementing Regulation No 17/62, the Commission granted exemptions only in a limited number of cases. The notifying parties were required to show not only that the market was in a situation of ongoing crisis caused by factors beyond their control and which could therefore only be resolved by concerted output

³ See, *inter alia*, JONES and SUFRIN, *EC Competition Law: text, cases and materials*, 2nd Ed., 2008: OUP, p. 807.

⁴ *Ibid.*; see also pp. 237-238.

⁵ See e.g. Commission Decision 84/380/EEC, *Synthetic Fibres*, 4 July 1984, [1984] OJ L207/17, para. 25-27.

⁶ See e.g. joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Suiker Unie and others v Commission*, [1975] ECR I-1663, para. 173-175.

⁷ Commission Notice, Guidelines on the applicability of Article 81 EC Treaty to horizontal cooperation agreements, [2001] OJ C2, para. 25; see also para. 18-19.

⁸ See e.g. Commission XII Report on Competition Policy, para. 38-41. For commentary, *inter alia*, WHISH, *Competition Law*, 6th Ed., 2007: OUP, p. 600.

⁹ Commission XII Report on Competition Policy, para. 38-39. See also Commission XXIII Report on Competition Policy, para. 85.

¹⁰ Commission XII Report on Competition Policy, para. 39.

¹¹ *Ibid.* See also Commission XXIII Report on Competition Policy, para. 82 and 89; Commission Notice, Guidelines on the applicability of Article 81 EC Treaty to horizontal cooperation agreements, [2001] OJ C2, para. 73-75, 84.

¹² Commission Notice, Guidelines on the applicability of Article 81 EC Treaty to horizontal cooperation agreements, [2001] OJ C2, para. 84-85.

¹³ *Ibid.*; see also Commission XXIII Report on Competition Policy, para. 89. For commentary, *inter alia*, FIEBIG, “European crisis cartels and the triumph of industrial policy over competition in Europe”, (1999) 25 *Brook. J Int’l L* 607 at 614-615.

¹⁴ Commission Notice, Guidelines on the applicability of Article 81 EC Treaty to horizontal cooperation agreements, [2001] OJ C2, para. 105, 107-108.

¹⁵ *Ibid.*; see also Commission XXIII Report on Competition Policy, para. 89.

reductions.¹⁶ They also had to prove that the arrangement was limited in its duration and geographic scope¹⁷ and did not totally curtail any remaining competition, by preserving a certain degree of “uncertainty” as to the parties’ future behaviour and by not irretrievably hampering any remaining competitive pressure from other rivals.¹⁸

The application of Article 101(3) TFEU to crisis cartel elicited mixed reactions: some commentators valued it as reflecting the idea that the application of the competition rules is not an “isolated phenomenon” but is strictly connected with the implementation of other policies, including those of an industrial or social nature.¹⁹ Other commentators regarded it as ‘distorting the legal interpretation of Article [101(3)]’ to implement goals of industrial policy²⁰ and as threatening the effectiveness and consistence of competition law.²¹

Although the concerns for the coherence of antitrust enforcement were not totally unjustified, this view was difficult to reconcile with the case law of the Court of Justice of the EU: in *Matra Hachette* the Court recognised that there was no restraint that could not benefit from the application of Article 101(3) TFEU and that if they could be subsumed within its assessment framework, other not strictly economic goals could be relevant for the granting of an exemption.²² Consequently, the Court de facto approved the Commission’s practice of considering whether individual arrangements could have a positive impact on the achievement of other policy objectives.²³

It is concluded that far from constituting an example of misuse of powers, the decisions concerning crisis cartels were fully compatible with the inner logic of the Treaty as a “complex tapestry” in which the pursuit of the “classical” goals of competition policy such as economic efficiency and consumer welfare have an impact on the achievement of other policy objectives.²⁴ The next section will examine the Court of Justice’s preliminary ruling in the *Barry Brothers* case and consider the extent to which the approach adopted by the Court “fits” within the principles that had hitherto guided the Commission practice in respect to crisis cartels.

2.2. Reducing overcapacity in the Irish cattle market: the ‘Barry Brothers’ case

2.2.1. Introductory remarks

Section 2.1 considered the approach adopted by the Commission in respect to crisis cartels and argued that these decisions sought to employ Article 101(3) EU Treaty to achieve goals of industrial policy without running counter the principle of “attributed powers” enshrined in the Treaty.²⁵ This section will consider the preliminary ruling in the *Barry Brothers* case.²⁶ *Barry Brothers* arose from an application made by the Irish Competition Authority to the Irish High

¹⁶ See e.g. Commission decision 84/380/EEC of 4 July 1984—*Synthetic Fibres* (IV/30.810), [1984] OJ L207/17, para. 28-29; see also para. 31-35.

¹⁷ *Inter alia*, Commission decision 94/296/ECof 29 April 1994—*Stichting Baaksten* (IV/34.456), [1994] OJ L131/15, para. 32-34.

¹⁸ *Id.*, para. 39-40. See also, *mutatis mutandis*, Commission decision 87/3/EEC of 4 December 1986—*ENI/Montedison* (IV/31.055), [1987] OJ L5/13, especially paras. 7-8, 21-22, 33-35.

¹⁹ HORNSBY, “Competition policy in the 80s: more policy less competition?”, (1987) 12(2) *ELRev* 79; also WHISH, above fn. 8, p. 600-601.

²⁰ FIEBIG, “European crisis cartels and the triumph of industrial policy over competition in Europe”, (1999) 25 *Brook. J Int’l L* 607 at 619.

²¹ *Id.*, p. 634-636. Cf. case T-17/93, *Matra Hachette v Commission*, [1994] ECR II-595, para. 85, 109-110.

²² *Id.*, para. 110; see also, *mutatis mutandis*, case 14/68, *Walt Wilhelm v Bundeskartellamt*, [1969] ECR I, para. 5.

²³ TOWNLEY, *Article 81 EC and public policy*, 2009: Oxford, Hart Publishing, p. 255.

²⁴ See e.g. *id.*, pp. 274-283.

²⁵ *Id.*, p. 255.

²⁶ Case C-209/07, above fn.1.

Court, seeking an order to restrain a number of meat producers from giving effect to their agreement aimed at restructuring the Irish cattle market, at the time in a serious crisis.²⁷

Following an independent report that had highlighted structural over-capacity due to a considerable fall in demand,²⁸ a number of beef suppliers devised a scheme entailing the closure of plants processing up to a quarter of the total meat production. The firms that had agreed to relinquish their position on the market undertook to put their plants beyond use, accepted restrictions as to their future sale and use for a period of five years and the obligation not to compete with the “staying firms” for two years. In exchange, they were entitled to receive a specific amount of compensation per head of cattle. The Irish Competition Authority took objection to the proposed restructuring plan and was especially concerned with the risk that, as a result of shrinking supply, consumer prices would increase.²⁹

However, the High Court found that the agreement did not have the object or the effect of restricting competition.³⁰ The Court accepted that the industry suffered from long term structural overcapacity³¹ and held that contrary to the NCA’s allegations the BIDS agreement did not contain any restrictions of competition ‘by object’, such as clauses fixing prices, sharing customers, limiting output or investments.³² Mr Justice McKechnie adopted a very literal view of Article 101(1)(a) TFEU, according to which only those practices listed therein constituted “by object” infringements of the Treaty competition rules³³ and rejected arguments that “slimming down” the overcapacity would have resulted in supply shortages and therefore in price increases³⁴ or that the “exit clauses” contained would encourage collusion among the remaining firms.³⁵ The *Barry Brothers* judgment was however appealed to the Irish Supreme Court, who in turn made a preliminary reference to the Court of Justice of the EU under Article 267 TFEU asking whether the BIDS agreement could be regarded as having an anti-competitive object. The preliminary ruling will be examined in the next section.

2.2.2. The ‘Barry Brothers’ preliminary ruling and its consequences for Article 101(1)

Section 2.2.1 offered a brief outline of the *Barry Brothers* case and emphasised that according to the Irish Competition Authority, the BIDS agreement constituted an infringement of Article 101(1) by object. Before the Court of Justice, Advocate General Trstenjak reiterated that this provision entailed a “two stage examination” of *prima facie* anti-competitive practices:³⁶ firstly, it should be considered whether a given arrangement is prohibited by paragraph 1, having regard to its ‘object’ or its ‘effects’,³⁷ and second, whether the practice meets the requirements of the legal exception contained in Article 101(3) TFEU.³⁸ As to the specific question of whether the BIDS agreement constituted a restriction ‘by object, the Advocate General acknowledged that the very notion of “restraint of competition” remained ‘hard to

²⁷ For commentary, see *inter alia* Van der VIJVER, “The Irish beef case”, (2009) 30(4) *ECLR* 198; also SVETLICINII, “ECJ’s ruling in beef industry case: competition law must be observed at all times”, (2008) 12 *Eur. L. Reporter* 402.

²⁸ “Preparing the beef industry for the 21st century”, prepared by McKinsey consultancy, Sept. 1998.

²⁹ See “The Competition Authority v BIDS”, available at: <http://www.tca.ie/EN/Enforcing-Competition-Law/Civil-Court-Cases/Beef-Industry.aspx>.

³⁰ *Competition Authority v BIDS*, 27 July 2006, per Mr J McKechnie, [2006] IEHC 294.

³¹ Case C-209/07, above fn.1, para. 96.

³² *Ibid.*

³³ *Id.*, para. 98.

³⁴ *Id.*, para. 105-107, 110-112.

³⁵ *Id.*, para. 113; see also para. 115-117.

³⁶ Per AG Trstenjak, para. 39.

³⁷ *Id.*, para. 37.

³⁸ *Id.*, para. 38-39.

grasp³⁹ and should be appraised in light of the overall objective of Article 101. Regard should be had to each practice's legal and economic context and to whether it limited the parties' freedom to determine their conduct independently on the market to such a degree as to have an appreciable adverse effect on the dynamics of competition.⁴⁰

AG Trstenjak rejected suggestions that the list provided by Article 101(1) EU Treaty should be regarded as 'exhaustive'⁴¹ and emphasised the need to consider the objective content of the agreement, its context and as far as it could be reasonably inferred from the circumstances, the intention of the parties.⁴² She observed that there may be certain agreements which, despite restraining the freedom of action of the parties, would be overall 'neutral' for competition, for instance because they are "ancillary" to a separate, lawful transaction,⁴³ have no appreciable impact on competition⁴⁴ or are 'ambivalent'⁴⁵ to it, because they facilitate new entry in the market.⁴⁶

As to the legality of the BIDS agreement, the Advocate General, however, stated that despite pursuing a 'pro-competitive (...) primary objective which was unobjectionable from a competition point of view',⁴⁷ i.e. the restructuring of an industry in crisis, the arrangement restricted competition 'by object'.⁴⁸ She noted that the agreement had resulted in production cuts and in the withdrawal of a number of competitors from the industry, whose structure had been, as a consequence, modified in a way that could not be justified if not as the outcome of collusion.⁴⁹ The imposition of flat 'compensation levies' on the firms that had opted for remaining active in the market⁵⁰ and the limitation on the "going" firms' freedom to dispose of their plants were regarded as stifling potential competition by erecting barriers to entry.⁵¹ Thus, AG Trstenjak concluded that the BIDS agreement had infringed Article 101(1) by reason of its object; however, she made clear that its supposed pro-competitive impact could be examined in the light of the framework of Article 101(3) TFEU to determine whether it could benefit from the legal exception.⁵²

In its judgment⁵³ the Court reiterated the "alternative" nature of the requirements listed in Article 101(1) TFEU and therefore held that it would not be necessary to consider the actual effects of the arrangement on the market conditions if it appeared from its content and purpose and on the basis of long standing experience that the agreement was 'by [its] very nature injurious to the proper functioning of normal competition'.⁵⁴ The Court rejected allegations that since the BIDS arrangement lacked an anti-competitive *animus* it did not infringe Article 101(1) by reason of its object.⁵⁵ Instead, it stated that regard should be had to the objective content of the arrangement and to the objectives that it sought to attain. In this context the subjective intention of the parties or even whether the arrangement pursued, along with anti-competitive

³⁹ *Id.*, para. 42.

⁴⁰ *Id.*, para. 43.

⁴¹ *Id.*, para. 48-49.

⁴² *Id.*, para. 44-46.

⁴³ *Id.*, para. 53.

⁴⁴ *Id.*, para. 51.

⁴⁵ *Id.*, para. 52.

⁴⁶ *Ibid.*

⁴⁷ *Id.*, para. 94.

⁴⁸ *Id.*, para. 62-63.

⁴⁹ *Id.*, para. 78-81.

⁵⁰ *Id.*, para. 83-86.

⁵¹ *Id.*, para. 87-93.

⁵² See e.g. *id.*, para. 99-101.

⁵³ Case C-209/07, above fn.1.

⁵⁴ *Id.*, para. 16-17.

⁵⁵ *Id.*, para. 19.

goals, other legitimate objectives would not be sufficient to exclude it from the scope of the prohibition.⁵⁶ It was emphasised that the arrangement was aimed at allowing the parties, who together controlled 90% of the market, to ‘achieve their minimum efficient scale’ and thereby increase their profitability⁵⁷ via a ‘common policy’ designed to reduce the industry’s structural overcapacity by 25% by encouraging some rivals to leave the market and thereby increasing its concentration.⁵⁸

The BIDS agreement was therefore in conflict with Article 101⁵⁹ because by resorting to the arrangement the parties would be able to refrain from engaging in fierce reciprocal rivalry, which would have, over time, led to ‘less efficient rivals’ being excluded from the market⁶⁰ and would have avoided the costs associated with industrial restructuring.⁶¹ The Court held that fixing a fee to allow the staying firms to “buy the customers” of the undertakings that had agreed to leave the market hampered ‘the natural development of the market shares’ because it created an incentive for the parties to freeze production once the minimum efficient scale had been attained.⁶² As to the clause restricting the freedom of the undertakings that had agreed to cease trading to dispose of their plants, the Court agreed with the Irish Competition Authority that, since it would have been less costly for a newcomer to purchase an existing plant than to create a new one, this condition would have dissuaded potential competitors from attempting to enter the Irish cattle market and would have therefore artificially foreclosed it.⁶³

It is difficult to understate the importance of *Barry Brothers*. The Court of Justice was unimpressed by the claims that the BIDS agreement should not be caught by Article 101(1) TFEU solely on the ground that it allegedly aimed at tackling the crisis of the Irish meat industry⁶⁴ and reiterated that “industrial policy” considerations concerning individual arrangements can only be analysed against the four conditions contained in Article 101(3), without affecting the anti-competitive nature of the arrangement.⁶⁵ Perhaps most importantly, the Court rejected any attempt to read an exhaustive list of “serious infringements” into Article 101(1) and concluded that the BIDS arrangement constituted a breach of that provision by reason of its ‘object’.⁶⁶ It therefore is argued that this preliminary ruling represents a ‘warning call’ for undertakings operating in ‘distressed industries’, who are reminded that ‘hard economic times do not justify anti-competitive practices’.⁶⁷

Against this background, it could be queried whether, had the Court been empowered to decide on the issue by the scope of the reference, it would have decided that the BIDS arrangement could benefit from the legal exception of Article 101(3). It is submitted that, although there are significant procedural differences between the “old style exemptions” and the preliminary reference procedure, providing an answer to this question would have been relevant to decide whether the Commission’s practice relating to crisis cartel remains “good law” today. It is noted that just as in a number of pre-Regulation No 1/2003 decisions,⁶⁸ the BIDS

⁵⁶ *Id.*, para. 21.

⁵⁷ *Id.*, para. 32.

⁵⁸ *Id.*, para. 33.

⁵⁹ *Id.*, para. 34.

⁶⁰ *Id.*, para. 33, 35.

⁶¹ *Id.*, para. 35.

⁶² *Id.*, para. 37.

⁶³ *Id.*, para. 38.

⁶⁴ See e.g. Van der VIJVER, “The Irish beef case”, (2009) 30(4) *ECLR* 198 at 200.

⁶⁵ *Ibid.*

⁶⁶ Case C-209/07, above fn. 1, para. 36-39.

⁶⁷ *Inter alia*, Van der VIJVER, “The Irish beef case”, (2009) 30(4) *ECLR* 198 at 200-201.

⁶⁸ See e.g. Commission decision 84/380/EEC of 4 July 1984—*Synthetic Fibres* (IV/30.810), [1984] OJ L207/17, para. 28-29; see also para. 31-35; Commission decision 94/296/EC of 29 April 1994—*Stichting Baaksten*

agreement was considered incompatible with Article 101(1) TFEU, since it had sought to reduce overcapacity in an industry characterised by sluggish demand that had become permanent over time and had been certified by an independent expert.

Nonetheless, although in principle, the agreement could have been regarded as improving production and eventually bring appreciable benefits for consumers,⁶⁹ it can be doubted that the arrangement would have met the “negative” requirements of Article 101(3). The preliminary ruling indicates that the BIDS agreement was concluded by a number of firms amounting to 90% of the overall market, thereby increasing the degree of concentration and minimising any threat of competition from remaining actors.⁷⁰ Moreover, the imposition of non-compete obligations and of limits on the “exiting firms” freedom to dispose of their plants and land, especially by selling them to outside competitors, allowed the parties to “cement” that level of concentration by creating a considerable barrier to entry vis-à-vis potential competitors,⁷¹ thus eliminating almost any remaining competition. It is also clear from the ruling that without agreeing to a “compensation scheme”, the firms that had opted for remaining on the market would not have been able to attain their “minimum efficient scale” of supply and thereby improve their profitability without having to make losses or relinquishing the market.⁷² Consequently, it could be argued that the restrictions of competition agreed by the BIDS members were not “indispensable” to achieve its supposedly “beneficial” objectives, within the meaning of Article 101(3)(c).⁷³

Therefore it is doubtful whether, had the Court had the jurisdiction to decide on this, the BIDS agreement would have been eligible for the application of the legal exception provided by Article 101(3) TFEU. Although the Court confirmed that in principle every agreement would be eligible for the application of that clause, it emphasised that through the BIDS agreement the parties had radically modified the structure of the market by concerted action and thereby been able to restructure the market without having to “weather” the consequences of the downturn, i.e. having either to relinquish the market or to merge.⁷⁴ It is concluded that *Barry Brothers* does not only constitute a stark reminder of the seriousness with which the Court of Justice takes the application of Article 101 TFEU, even in times of economic uncertainty; it also seems to question, at least to a degree, the continuing applicability of those principles and approaches on which the Commission had relied in its crisis cartels decisions adopted before the enactment of Council Regulation No 1/2003. The next section will consider what the consequences of this decision are likely to be for the evolution of the interpretation of Article 101 TFEU.

(IV/34.456), [1994] OJ L131/15, para. 32-34, 39-40. See also, *mutatis mutandis*, Commission decision 87/3/EEC of 4 December 1986—*ENI/Montedison* (IV/31.055), [1987] OJ L5/13, especially paras. 7-8, 21-22, 33-35.

⁶⁹ See e.g., *mutatis mutandis*, Commission XXIII Report on Competition Policy, para. 82-84; see also *Competition Authority v Beef Industry development Society Ltd and another*, judgment of 3 November 2009, [2009] IESC 72, disposal, part (a).

⁷⁰ Case C-209/07, above fn.1, para. 32. Cf. e.g. Commission decision 84/380/EEC of 4 July 1984—*Synthetic Fibres* (IV/30.810), [1984] OJ L207/17, para. 32-33.

⁷¹ *Id.*, para. 35.

⁷² *Id.*, para. 31; see also para. 38-39.

⁷³ *Id.*, para. 38. Cf. *Competition Authority v Beef Industry development Society Ltd and another*, judgment of 3 November 2009, [2009] IESC 72, disposal, part (b).

⁷⁴ Case T-17/93, *Matra Hachette v Commission*, [1994] ECR II-595, para. 85; see also para. 32, 35-39. See e.g., *mutatis mutandis*, case 6-72, *Europemballage Corp and Continental Can Co Ltd v Commission*, [1973] ECR 215, para. 19; see also para. 24-26.

3. Looking at *Barry Brothers* against the more general framework of Article 101 EU Treaty: what are its implications for the notion of ‘restriction of competition’?

3.1. *‘Barry Brothers’ and Article 101: back to basics for restrictions by object?*

Section 2 discussed the *Barry Brothers* preliminary ruling in the light of the Commission’s practice relating to crisis cartels. This section will consider what impact the preliminary ruling is likely to have on the current and future interpretation of Article 101 TFEU.⁷⁵ Commentators suggested that the Court made a “move back to basics” in its interpretation of Article 101 because it had confined the assessment of the existence of a restriction of competition to the realm of Article 101(1) and the appraisal of whether the latter could be justified by “broader” considerations, including those relating to industrial policy, to the four conditions listed in Article 101(3).⁷⁶ Having regard to the prohibition clause, the Court of Justice, whilst reiterating the distinction between ‘by object’ and ‘by effect’ infringements, rejected the argument that there should only be an “exhaustive list” of “hard core” anti-competitive practices⁷⁷ and held that each practice should be examined in light of its content and purpose and of the restrictions it imposed on the freedom of action of the parties.⁷⁸

Against this background, how we should construe the notion of ‘restriction of competition’ for the purposes of Article 101 TFEU emerges once again at the central question. In her Opinion, AG Trstenjak focused on the actual function of Article 101 TFEU, namely safeguarding competition “as a process” to promote consumer welfare,⁷⁹ and suggested that for there to be a restriction of competition it would have to be established not only that a given arrangement restrained the freedom to trade of the parties, but also that as a result of it competition would be adversely affected.⁸⁰ In this context, the separate issue of whether individual practices restricted competition “by object” or “by effect” could only be decided after considering to what extent the former was inconsistent with the goals of Article 101. If following this examination the arrangement was found to be ‘by [its] very nature (...) injurious’ to these goals, it would be sanctioned without taking a ‘close look’ at its actual impact on the market.⁸¹ In any other case, however, the practice would only be caught by Article 101(1) if, assessed in its actual legal and economic context, competition had been appreciably distorted.⁸²

In *Barry Brothers* the Court of Justice confirmed the “textual dichotomy” between ‘by object’ and ‘by effect’ prima facie breaches and considered the seriousness of each infringement on the basis of the experience of its impact on competition.⁸³ The Court drew a line between particularly damaging practices for the competitive process and forms of less “deleterious” behaviour. The former will, due to their nature, be “presumed” to have anti-competitive effects, without a separate inquiry as to their impact on the market being required.⁸⁴ The latter will have to be examined more closely and will be held to be prohibited by Article

⁷⁵ Van der VIJVER, “The Irish Beef case”, (2009) 30(4) ECLR 198 at 200.

⁷⁶ *Ibid.*; see also SVETLICINII, “ECJ’s ruling in beef industry case: competition law must be observed at all times”, (2008) 12 *Eur. L. Reporter* 402 at 404-405.

⁷⁷ Case C-209/07, above fn. 1, para. 16-17.

⁷⁸ *Id.*, para. 17.

⁷⁹ Case C-209/07, *Barry Brothers*, AG opinion of 4 September 2008, above fn.1, para. 42.

⁸⁰ *Ibid.*

⁸¹ Case C-209/07, *Barry Brothers*, judgment of 25 November 2008, above fn. 1, para. 17. For commentary, see e.g. ODUDU, *The boundaries of EC Competition Law: the scope of Article 81*, 2006: OUP, p. 114-115.

⁸² See e.g. case C-209/07, *Barry Brothers*, above fn.1, para. 15. For commentary, see *inter alia*, FURSE, *Competition law of the EC and the UK*, 2008: OUP, pp. 177-178.

⁸³ See e.g. case 56/65, *STM v MBU*, [1966] ECR 235, p. 248.

⁸⁴ *Id.*, p. 249.

101(1) TFEU only if it can be shown that they have resulted in an appreciable distortion of competition.⁸⁵

The judgment also appears to suggest that it should be possible, in application of this “in-context” and more “economics principled” pattern of analysis, to rebut the “presumption of anti-competitive” effects arising from a finding that a given practice had breached Article 101(1) by reason of its object. AG Trstenjak pointed out that the need to consider all *prima facie* restrictive practices against their actual context should be ‘taken seriously’⁸⁶ and as a result accepted that a party seeking to disprove the allegations of an infringement to prove the existence of ‘elements of legal and economic context which could cast doubt on the existence of a restriction of competition.’⁸⁷

Another feature of the preliminary ruling was the emphasis on the distinction between, respectively, the inquiry as to the actual existence of a restriction of competition and the assessment of the extent to which the arrangement could be ‘tolerated’ as consistent with the four conditions of Article 101(3) TFEU.⁸⁸ It could be argued that this reading of the division of labour between Article 101(1) and (3) TFEU was consistent with earlier case law and therefore unsurprising. Nonetheless, it is suggested that the *Barry Brothers* preliminary ruling should not be examined in isolation but should be read in the wider context of the more recent case law concerning Article 101 TFEU, including decisions concerning restrictions of competition ‘by effect’.⁸⁹ After considering in brief these judgments, the next sections will examine whether the method of analysis proposed by the Court of Justice for “less serious” restraints can be reconciled with that applied in “by object” cases.

3.2. *Article 101 and restrictions ‘by effect’: from restrictions of trade to the need to carry out a “counterfactual analysis”—a more economics based approach for this concept?*

Section 3.1 considered the implications of *Barry Brothers* for the notion of “restriction of competition”. It was argued that the preliminary ruling re-endorses the “bifurcated” structure of Article 101 TFEU and confirms the rigorous reading of the concept of restriction “by effect” and “by object” as “alternative requirements” for the application of the prohibition clause. Perhaps more importantly, the Court of Justice expressly chose to analyse the arrangement against its actual legal and economic context, despite having found that it constituted an inherently “obvious” infringement of the competition rules, which, in turn justified a presumption of its anti-competitive effects. Against this background, it could be queried whether this analysis shares any common threads with the framework for assessment applied to restrictions “by effect” in recent decisions.

The limited purvey of this paper does not allow for an exhaustive examination of the case law concerning “by effect” restraints.⁹⁰ Suffice to say that the Court of Justice has decidedly moved away from a “broad” reading of Article 101(1) TFEU according to which all practices having an adverse impact on the parties’ freedom to trade would be held incompatible with the

⁸⁵ *Ibid.*

⁸⁶ Case C-209/07, *Barry Brothers*, AG opinion of 4 September 2008, above fn.1, para. 50.

⁸⁷ *Ibid.*; for commentary, ODUDU, “Restriction of competition by object—what is the beef?”, (2008) *Comp Law* 11 at 14 and 15-16. But cf. case C-209/07, *Barry Brothers*, above fn. 1, para. 19-21 with, , *mutatis mutandis*, case C-235/92 P, *Montecatini v Commission*, [1999] ECR I-4539, para. 122.

⁸⁸ See e.g. case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 74; also, case T-374-75, 384 and 388/94, *European Night Services and others v Commission*, [1998] ECR II-3141, para. 135-136.

⁸⁹ Case C-519/04 P, *Meca Medina and Majcek v Commission*, [2006] ECR I-6991; case T-328/03, *O2 v Commission*, [2006] ECR II-1231; for commentary, see *inter alia* JONES, “Analysis of agreements under US and EC antitrust law—convergence or divergence?”, (2006) 51(4) *Antitrust Bulletin* 691 at 788.

⁹⁰ See e.g. case C-519/04 P, *Meca Medina and Majcek v Commission*, [2006] ECR I-6991; *mutatis mutandis*, case T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209; Case T-328/03, *O2 v Commission*, [2006] ECR II-1231.

Treaty competition rules to a more “selective” view of the notion of restriction of competition.⁹¹ Accordingly, agreements not entailing “serious” infringements of the competition rules would have to be assessed in their actual context and would be prohibited by Article 101(1) TFEU only if they had in fact appreciably impaired competition,⁹² taking into account the nature and quantity of the products affected, the size of the concerned parties and the existence of any ‘networks’ of similar practices.⁹³

It is also clear that this relatively more “restrained” reading of the concept of restriction of competition is directly related to the interpretation of the legal exception contained in Article 101(3) TFEU.⁹⁴ Commenting on the relationship between the prohibition clause and the legal exception within Article 101 TFEU Jones expressed the view that the EU Courts’ approach had resulted in de facto ‘dividing up’ the assessment of anti-competitive practices into two prongs: Article 101(1) TFEU addressed the question of whether an arrangement had had a negative impact on competition whereas Article 101(3) TFEU provided the legal framework to analyse the defendants’ pleas that their agreement had a beneficial impact on efficiency which outweighed its negative effects on rivalry.⁹⁵

It is therefore suggested that the scope of the application of the legal exception is directly related to, and can consequently be defined only in the light of, the breadth assigned to the prohibition and especially to the notion of restriction of competition. It is well-known that the relatively generous view of this concept was criticised by commentators on the ground that it could lead to ‘economically indefensible’ conclusions that Article 101(1) TFEU had been breached, especially in less serious cases.⁹⁶ Furthermore, that broad reading of what constituted a restriction of competition inevitably resulted in shifting a significant part of that assessment to the framework of paragraph 3. In response to these concerns, the Commission, as part of its plans of Modernisation of the competition enforcement structures, sought to elaborate a more “economics-based” approach to the prohibition clause.⁹⁷

The 2004 Guidelines on the application of Article 81(3) (hereinafter referred to also as Article 81(3) Guidelines) reaffirmed the view of Article 101 TFEU as having a ‘bipartite structure’, between the prohibition clause—focused mainly on its negative effects for competition—and the legal exception—concerned instead with the assessment of any benefits stemming from a *prima facie* restrictive practice.⁹⁸ To prove an infringement of Article 101(1) ‘by effect’ it would therefore be necessary to demonstrate that as a result of the restraint, having regard to the actual context of the practice, competition was appreciably distorted; by contrast,

⁹¹ See e.g. case 56/64, *Consten and Grundig v Commission*, [1966] ECR 429, pp. 472-473; also case 56/65, *STM v MBU*, [[1966] ECR 337. For commentary see, *inter alia*, ODUDU, *The boundaries of EC Competition law: the scope of Article 81*, 2006: OUP, p. 98.

⁹² Case 56/65, above fn. 91, p. 249.

⁹³ *Id.*, p. 250; also case C-234/89, *Delimitis v Henninger Brau AG*, [1991] ECR I-935, para. 18-21. For commentary, see e.g. WHISH, above fn. 8, p. 116-117.

⁹⁴ See e.g. case C-17/93, *Matra Hachette v Commission*, [[1994] ECR II-595, para. 85. See also Commission Guidelines on the application of Article 81(3), [2004] OJ C101/97 (hereinafter referred to as Article 81(3) Guidelines), para. 32-33.

⁹⁵ JONES, “Analysis of agreements under US and EC antitrust law—convergence or divergence?”, (2006) 51(4) *Antitrust Bulletin* 691 at 788.

⁹⁶ ODUDU, *The boundaries of EC Competition law: the scope of Article 81*, 2006: OUP, p. 99; see also pp. 105-106; see e.g. case 56/64, *Consten and Grundig v Commission*, [1966] ECR 429 at 433.

⁹⁷ JONES, above fn. 95, pp. 748-749; see also SCHWEITZER, “Competition law and public policy: reconsidering an uneasy relationship—the example of Article 81”, in DREXL et al., *Economic theory and competition law*, 2009: E Elgar, Cheltenham, p. 140.

⁹⁸ Article 81(3) Guidelines, para. 33; see also para. 40-41. For commentary see SCHWEITZER, “Competition law and public policy: reconsidering an uneasy relationship—the example of Article 81”, in DREXL et al., *Economic theory and competition law*, 2009: E Elgar, Cheltenham, p. 144-145.

any allegation that the latter would be likely to benefit economic efficiency and consumer welfare could only be considered against the framework provided by the four conditions of the legal exception, without affecting the prior conclusion that the practice had infringed the prohibition clause.⁹⁹ The Guidelines were consistent with long-standing EU courts' case law according to which in the application of the prohibition clause there would be no space for a 'comparative assessment' of the pro- and the anti-competitive effects of individual practices.¹⁰⁰

However, in other judgments the EU Courts seemed to cast doubt at least in part on the "bipartite" structure they had developed for the interpretation of Article 101 TFEU. The Court firstly elaborated its concept of "ancillarity" of restrictions of the parties' freedom of trade and took the view that restraints that were "necessary" and "proportionate" to pursue a 'legitimate commercial purpose' as well as, perhaps more controversially, a public interest goal could be regarded as falling outside the remit of Article 101(1) TFEU altogether.¹⁰¹ In more recent cases the Court of Justice was prepared to bring this more "economics-principled" and realistic approach to the prohibition clause a step closer to "balancing" the pro- and anti-competitive effects of individual practices, in a way which have been hitherto regarded as falling within the scope of the legal exception.¹⁰²

In the *Meca Medina* case¹⁰³ the Court of Justice held that although the decision of the association of undertaking at issue entailed a limitation in the freedom of action of an 'undertaking' (namely, an individual engaged in sports activities for the purpose of gainful employment),¹⁰⁴ it should not be regarded as automatically prohibited by Article 101, without analysing its legal and economic context. The Court observed that since they pursued legitimate goals, i.e. the protection of the health of athletes and the integrity of competitive sports,¹⁰⁵ and were limited to what was necessary to achieve that objective¹⁰⁶ the anti-doping rules and especially the sanctions imposed for their infringement, were not incompatible with the Treaty competition rules.¹⁰⁷ Thus, it was concluded that although they restrained the economic freedom of the applicants, these rules were not caught by the prohibition clause.¹⁰⁸

Meca Medina was regarded by many commentators as confirming a cautious move toward the application of a 'standard of reason' in the interpretation of Article 101(1) EU Treaty to satisfy the demands of the public interest.¹⁰⁹ Due to the nature of the case, it was queried whether the fact that the anti-doping rules had not been notified to the Commission to secure an

⁹⁹ See e.g. case 56/64, *Consten and Grundig v Commission*, [1966] ECR 429 at 472-473; also case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 74.

¹⁰⁰ See e.g. *Board of Trade of the City of Chicago v US*, 246 US 231 at 244; *infra*, sect. 4.2. Cf. Case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 72-74.

¹⁰¹ Case 42/84, *Remia BV v Commission*, [1985] ECR 2545, para. 17-19; Case C-250/92, *Gottrup Klim e.a. v Dansk Landburgs G. AmbA*, [1994] ECR I-5641, para. 34-35; see also Article 81(3) Guidelines, para. 31-32. See also case 309/99, *Wouters*, para. 90, 97; see also para. 100-109. For commentary, see inter alia, WHISH, above fn. 8, p. 129-30; cf. MONTI, "Article 81 and public policy", (2002) 39(5) *CMLRev* 1057 at 1083-85 and 1086-1087; also O'LOUGHLIN, "EC competition rules and free movement rules: an examination of the parallels and their furtherance by the ECJ *Wouters* decision", (2003) 24(2) *ECLR* 62 at 64, 68-69; TOWNLEY, *Article 81 EC and public policy*, 2009: Oxford, Hart Publishing, p. 137-138.

¹⁰² Case C-519/04 P, *Meca Medina and Majcek v Commission*, [2006] ECR I-6991, para. 24-25; see also, *mutatis mutandis*, case T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209, para. 91-99; for commentary see WHISH, above fn. 8, pp. 128-129.

¹⁰³ Case C-519/04 P, *Meca Medina and Majcek v Commission*, [2006] ECR I-6991.

¹⁰⁴ *Id.*, para. 24-25. See also, *mutatis mutandis*, case T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209, para. 91-99.

¹⁰⁵ *Id.*, para. 43; see also para. 45-46.

¹⁰⁶ *Id.*, para. 44; see also para. 47-49.

¹⁰⁷ *Id.*, para. 42.

¹⁰⁸ *Ibid.*

¹⁰⁹ WHISH, above fn. 8, p. 130-31; also JONES, above fn. 95p. 785.

exemption under Article 101(3) TFEU could have played a part in the Court's reasoning.¹¹⁰ It is acknowledged that, in any event, this decision does not sit very comfortably with the bifurcated structure of Article 101 TFEU suggested by the Commission, as a result of which it should only be within the framework of the four conditions for the application of the legal exception that any positive aspects of a *prima facie* restraint of competition should be weighed against its anti-competitive effects.¹¹¹

Whish suggested that this framework for analysis should be relevant only for restrictions of competition resulting from the operation of regulatory structures affecting the freedom of trade of undertakings in the public interest.¹¹² By contrast, the "bifurcated" pattern of assessment entailed by Article 101 TFEU should apply to restraints on the freedom of trade stipulated for commercial purposes.¹¹³ Although this view may be appealing because of the subject matter of *Meca Medina*, it appears less sustainable in light of later developments which, instead, seem to suggest that this judgment could be part of a broader trend toward the introduction of a 'EU style rule of reason' in the application of Article 101(1) TFEU beyond "public interest" cases.¹¹⁴

In *O2 v Commission*, the applicant challenged the decision with which the Commission had found that a roaming agreement stipulated between O2 and T-Mobile infringed Article 101(1) but could benefit from an exemption under Article 101(3) on account of its competition enhancing effects.¹¹⁵ On appeal, the General Court confirmed that the assessment of whether an agreement infringed Article 101(1) should be carried out having regard to the legal and economic context in which that agreement had been concluded and should especially take into account 'its object, its effects' and the extent to which it affected the pattern of trade between member states, having regard to the context in which the parties operated, the nature of the products or services affected by it and the features of the market.¹¹⁶ The Court made clear that this framework for assessment would be applicable to all practices and added that when an agreement did not entail a restriction on competition 'by object', for it to be prohibited the Commission should demonstrate the existence of 'such factors (...) which show that competition has in fact been restricted (...) to an appreciable extent.'¹¹⁷ It was emphasised that this appraisal should compare the state of competition that existed in the absence of the agreement with the degree of competition that resulted from its existence and operation.

The General Court rejected allegations that to apply this kind of analysis would 'amount to carrying out an analysis of the pro- and the anti-competitive effects' of the agreement.¹¹⁸ Instead, it pointed out that this examination would be focused only on the existence of appreciable anti-competitive effects stemming from the agreement and would therefore be based on an analysis of its actual impact on existing and potential competition.¹¹⁹ It emphasised that the roaming agreement had sought to "rebalance" the inequality existing between T-Mobile, who enjoyed a dominant position on the German mobile communications market, and O2, which was the last entrant into that market, by providing the latter with access to infrastructure that would have enabled it to compete with the existing incumbents.¹²⁰

¹¹⁰ TOWNLEY, above fn. 101, p. 137-138.

¹¹¹ JONES, above fn. 95, p. 788.

¹¹² WHISH, above fn. 8, p. 130-31.

¹¹³ *Ibid.*

¹¹⁴ See e.g. JONES, above fn. 95, p. 786-787; also MARQUIS, "O2 (Germany v Commission and the exotic mysteries of Article 81(1))", (2007) 32(1) *ELRev* 29 at 42-43.

¹¹⁵ Case T-328/03, *O2 v Commission*, [2006] ECR II-1231, para. 6.

¹¹⁶ *Id.*, para. 66.

¹¹⁷ *Id.*, para. 67-68; see also para. 69.

¹¹⁸ *Ibid.*

¹¹⁹ *Id.*, para. 70-71.

¹²⁰ *Id.*, para. 107-108.

It was added that, although this arrangement had engendered a certain degree of dependence between the parties that dependence was, first of all, destined to disappear overtime and secondly, did not affect the ability of O2 to create its own infrastructure with a view to competing with the other incumbents on an independent footing.¹²¹ Accordingly, the Court concluded that the Commission decision, by failing to take into account the extent to which the agreement had enabled a new entrant to penetrate the relevant market and thereby would have achieved an increase in competition that would not have been feasible without the agreement itself, was vitiated by a manifest error of assessment and should therefore be annulled.¹²²

It is suggested that the O2 judgment came as something of a surprise if regard is had to the administrative decision it annulled. The Commission, consistently with its Guidelines and with earlier case law, had first of all applied Article 101(1) to the roaming agreement and found that, due to its content and its objectives, the arrangement would have facilitated collusion in relation to important aspects of the parties' conduct on the market.¹²³ Secondly, it had considered whether the agreement complied with the four conditions listed in Article 101(3).¹²⁴ In this context, the Commission had identified efficiency-enhancing effects for the market and clear benefits for consumers stemming from the presence of a viable new incumbent.¹²⁵ Accordingly, it concluded that the agreement could benefit from the legal exception.

By contrast, the General Court, with its 'counterfactual analysis', conducted a far more 'searching inquiry' into whether the practice constituted a restriction of competition.¹²⁶ Consequently, it is suggested that when an agreement or concerted practice does not contain any "obvious" restraints on competition, the inquiry as to whether Article 101(1) was infringed would have to concentrate on the extent to which any negative effects stemming from the limits placed on the parties' freedom of action on the market had in fact resulted either in a distortion of or in an "increase" in competition, for instance because, thanks to the agreement, a new entrant had been able to start operating viably on the market.¹²⁷

It is submitted that O2 represents a "good example" of the General Court's willingness to apply sound economic analysis in the application of Article 101 TFEU.¹²⁸ However, other commentators pointed out that despite rejecting in principle the idea of "balancing" pro- and anti-competitive effects within Article 101(1), the Court had in fact employed a framework of analysis which was very similar to the legal standard applied by the US Supreme Court in respect to "rule of reason" infringements of Section 1 of the US Sherman Act. The next section will attempt to provide a brief illustration of some of the principles underscoring the interpretation of the US Federal anti-cartel laws with a view to considering whether these conclusions can be justified.

3.3. 'Per se' and 'Rule of Reason' infringements of Section 1 of the US Sherman Act—summary remarks

Section 3.2 provided an outline of the approach adopted by the EU Courts in respect to 'by effect' restrictions of competition and highlighted some of the features of the "counterfactual analysis" applicable to these "less serious" infringements that resulted from the O2 judgment. It was argued that despite expressly rejecting the applicability of a "rule of reason" type analysis to

¹²¹ *Id.*, para. 108-109.

¹²² *Id.*, para. 114-116.

¹²³ Commission decision 2004/207/EC, *T-Mobile Deutschland/O2 Germany*, [2004] OJ L75/32, see e.g. para. 91-93.

¹²⁴ *Id.*, para. 121-128.

¹²⁵ *Id.*, para. 129-130.

¹²⁶ MARQUIS, "O2 (Germany v Commission and the exotic mysteries of Article 81(1))", (2007) 32(1) *ELRev* 29 at 44.

¹²⁷ Case T-328/03, *O2 v Commission*, [2006] ECR II-1231, especially paras. 68-69, 71-72, 75-79. For commentary, see MARQUIS, above fn. 126, p. 44.

¹²⁸ See e.g. MARQUIS, above fn. 126, pp. 43-44. Also, JONES, above fn. 95, p. 789-790.

these restraints the General Court had developed a framework for their assessment that was very similar to a comparative evaluation of their pro- versus anti-competitive effects. This section will provide a brief summary of the manner in which the US Federal Courts have interpreted Section 1 of the US Sherman Act. It is anticipated that this cursory examination will form the background against which the trends characterising the application of Article 101 TFEU will be considered in later sections.

As is well known, Section 1 of the US Sherman Act prohibits ‘every contract (...) in restraint of trade or commerce among the several states or with foreign nations (...)’. However, it soon became clear that, if it had been construed literally¹²⁹ the scope of Section 1 would have gone as far as to prohibit, in substance, every contract capable of having an impact on trade.¹³⁰ Therefore, the Supreme Court held in its *Standard Oil Co.* decision¹³¹ that Section 1 should be interpreted in accordance with ‘a standard of reason’ and, consequently, should only prohibit those arrangements that after an investigation of their ‘competitive significance’¹³² place an ‘undue restraint’ on the economic freedom of the parties.¹³³

In assessing whether a restraint of trade is ‘unreasonable’ the decision-maker will have to consider whether, having regard to the ‘nature or character of the contracts’ and to the ‘surrounding circumstances’, the practice gives rise to a ‘presumption’ that it has resulted in anti-competitive effects, especially in the form of higher prices or reduced output.¹³⁴ In this context the US Courts have employed two distinct, yet ‘complementary categories of antitrust analysis’, whose applicability is determined in relation to the nature of the actual arrangement in each case, to its nature and context and to the circumstances surrounding it.¹³⁵ According to the US Supreme Court in *National Professional Society of Engineers*:

‘ (...) In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are “illegal *per se*.” In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. (...)’¹³⁶

On the basis of this approach, practices such as price fixing and the restriction of output or sales are normally regarded as falling within the first category¹³⁷ since in these cases ‘anticompetitive conduct [is likely to be] so great as to render unjustified further examination’ of the practice.¹³⁸ To the second category, instead, belong those practices whose anti-competitive impact is not equally ‘immediate’ or ‘obvious’ in light of its content and purpose¹³⁹ and for which

¹²⁹ See e.g. *US v Trans-Missouri Freight Association*, 166 US 318 (1897), 17 S. Ct. 540, especially at 547-48.

¹³⁰ E.g. *Board of Trade of the City of Chicago v US*, 246 US 231 at 244.

¹³¹ *Standard Oil Co of New Jersey v US*, 221 US 1 (1911).

¹³² See e.g., *NCAA v Board of Regents of Oklahoma*, 468 US 85 at 103. For commentary, see JONES, above fn. 95, p. 694-695.

¹³³ *Standard Oil Co of New Jersey*, above fn. 131 at 59-60. See also, more recently *NCAA v Board of Regents*, above fn. 132, at 98.

¹³⁴ *Standard Oil Co of New Jersey*, above fn. 131, at 55.

¹³⁵ *National Society of Professional Engineers v US*, 435 US 679 at 692. See e.g. JONES, above fn. 95, p. 696.

¹³⁶ *Ibid.*

¹³⁷ See, *inter alia*, *NCAA v Board of Regents of Oklahoma*, 468 US 85 at 98-99; also, *Arizona v Maricopa County Medical Society*, 457 US 332 at 356.

¹³⁸ *Inter alia*, *NCAA v Board of Regents of Oklahoma*, above fn. 137 at 103-104. For commentary, *inter alia*, LEMLEY and LESLEY, “Categorical analysis in Antitrust jurisprudence”, J.M. Olin Program in Law and Economics, Stanford Law School, Working Paper No 348, Nov. 2007, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026967, especially pp. 7 et seq.

¹³⁹ See e.g. *Continental TV Inc v GTE Sylvania Inc*, 433 US 36 at 51.

the same ‘simple’ inquiry involved in the application of ‘per se’ rules will not be sufficient. In these cases, it is necessary to carry out a “fuller”, more detailed inquiry.

As Mr Justice Brandeis famously held in *Board of Trade of the City of Chicago*, ‘every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence’.¹⁴⁰ An agreement not containing any “nefarious” restrictions of competition will therefore be subjected to a different test focused on ‘whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition’,¹⁴¹ having regard to ‘the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable’.¹⁴²

The meaning and the implications of the rule of reason test as enunciated by Brandeis J has been widely debated and the limited scope of this paper does not allow for any detailed consideration of its impact. It is however indispensable to point out that despite the inevitable difficulties arising from its application, this approach came to be almost the “default” test for the application of Section 1 of the Sherman Act.¹⁴³ Consequently, the remit of the ‘per se’ rules would be necessarily limited to those practices having so ‘pernicious effects on competition and lacking any redeeming virtues’ that can be simply presumed to be unreasonable without any more elaborate inquiry being necessary.¹⁴⁴

It will be illustrated in later sections that the line between ‘per se’ and ‘rule of reason’ infringements of Section 1 is now less “bright” than at the time of *Standard Oil Co.*¹⁴⁵ However, if the analysis conducted so far is contrasted with the approach to Article 101(1) TFEU adopted in O2, a number of similarities may be detected between the “counterfactual analysis” applied by the General Court and the rule of reason approach resulting from *Board of Trade of the City of Chicago*. It is submitted that at the basis of its decision the General Court, in a way which reminded of the Supreme Court’s *dictum* in *Board of Trade*, was an emphasis on the need to assess whether the *prima facie* restrictive agreement could “enhance” or “suppress” competition: in this context, the Court took the view that, since the roaming agreement had actually allowed the entry of a new rival, it should not be caught by the prohibition of Article 101(1) TFEU.¹⁴⁶ This reading of Article 101(1) appears, however, difficult to reconcile with the view adopted by the EU Courts in earlier decisions and with the Commission’s own Guidelines¹⁴⁷ and could be regarded as having made the “leap” toward a view of ‘by effect’ restrictions whose compatibility with Article 101 TFEU had been considered doubtful in several earlier judgments.¹⁴⁸

It may therefore be concluded that the approach to restrictions of competition ‘by effect’ has undergone significant change, moving from a nearly “catch all” notion, designed to cover any restraint on the freedom of trade of the undertakings concerned, to a far more restrained concept. However, the analysis of the O2 decision suggested that due to the application of that “counterfactual analysis”, practices that may have been found to be injurious to competition in the past may now be considered to be “neutral” for competition and, furthermore, that some of

¹⁴⁰ *Board of Trade of the City of Chicago v US*, 246 US 231 at 244.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ See e.g., *mutatis mutandis*, *Continental TV Inc v GTE Sylvania Inc*, 433 US 36 at 51.

¹⁴⁴ *Ibid.*

¹⁴⁵ Below, section 4.2., fn. 174 and accompanying text.

¹⁴⁶ Case T-328/03, *O2 v Commission*, [2006] ECR II-1231, para. 40-41; cf. *Board of Trade of the City of Chicago v US*, 246 US 231 at 244.

¹⁴⁷ Case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 72-74.

¹⁴⁸ See e.g., *mutatis mutandis*, case C-238/05, *Asnef/Equifax and others v Ausbanc*, [2006] ECR I-11125, para. 28-29, 55-60.

the analysis that has hitherto taken place against the framework of the legal exception now occurs as part of the “in-context” approach that the prohibition clause now entails.

Consequently, a number of questions emerge: first of all, what does this all mean for the dichotomy between ‘by object’ and ‘by effect’ restrictions? Second, what is the function of Article 101(3) TFEU today? If the analysis of alleged allocative efficiency gains is to be conducted as part of the Article 101(1)’s “counterfactual” test, what kind of effects and goals should the four conditions of the legal exception take into considerations, especially in less serious cases? And what, if any, are the implications of *Barry Brothers* for the overall pattern of analysis that should be applied to individual cases in order to determine the existence of a restriction of competition? These questions will be addressed in the next sections.

4. “Modernising” the interpretation of Article 101 TFEU: has a more economics based notion of restriction of competition emerged? And with what effects?

4.1. Can the “orthodox” reading of ‘by object’ infringements be reconciled with the “new view” of ‘by effects’ breaches?

Section 3 summarily discussed both the “orthodox” approach to Article 101 TFEU adopted in *Barry Brothers* and the meaning and implications of the “flexible” analysis applicable to restrictions of competition ‘by effect’. This section will examine the implications of *Barry Brothers* for the current interpretation of the prohibition clause. It is recalled from Section 2.3 that the Court of Justice in *Barry Brothers* firmly upheld the distinction between ‘by object’ and ‘by effect’ restraints enshrined in the Treaty. However, the preliminary ruling also indicated that whether a given agreement fell within one or the other “category”, far from being based on an “exhaustive list” had to be determined in each case by way of an examination of its “content and purpose” against its legal and economic context. It would only be after this examination that the type of inquiry (whether “presumptive” or “actual”) as to the impact of the arrangement on rivalry would have to be determined.

The reading of the prohibition clause contained in *Barry Brothers* may be contrasted with, for instance, *European Night Services*. In that judgment the General Court seemed to suggest that a different framework for analysis would have to apply to “more serious” as opposed to “less obvious” restraints. It was held that in applying Article 101(1) TFEU,

‘account should be taken of the actual conditions in which [the practice] functions, in particular the economic context in which the undertakings operate, the products (...) covered by the agreement and the actual structure of the market (...), *unless it is an agreement containing obvious restrictions of competition such as price fixing, market sharing or the control of outlets (...)*’.¹⁴⁹

As a result, a number of commentators argued that a differentiated approach should be adopted to scrutinise “hard-core” infringements indicated by the General Court. According to this approach, it would not be necessary to consider these practices in their legal and economic context: their anti-competitive effects would be merely “presumed” and they would be regarded as infringing Article 101(1) TFEU only on the basis of their content and their purpose. It would, however, still be possible for the parties to the agreement to demonstrate the existence of any pro-competitive effects stemming from that practice and to prove that the latter fulfilled the four conditions required for the application of the legal exception of Article 101(3) TFEU.¹⁵⁰ By

¹⁴⁹ Case T-374-375/94, *ENS v Commission*, [1998] ECR II-3141, para. 136 (emphasis added).

¹⁵⁰ See, *inter alia*, JONES and SUFRIN, *EC Competition Law: text, cases and materials*, 2nd Ed., 2008: OUP, p. 183-184; see also JONES, above fn. 95, p. 757, 760-761.

contrast, “less obvious” prima facie infringements would have to be considered against their legal and economic context; their anti-competitive effects should not be only “presumed”, but would have to be carefully appraised in order to determine whether, as a result of the practice, competition had actually been hampered.¹⁵¹

Against this background, it is legitimately doubted that the careful examination conducted by the Court of Justice in *Barry Brothers* remains consistent with the pre-existing apparently stark dichotomy between ‘by object’ and ‘by effect’ infringements suggested in *ENS*.¹⁵² It is argued that the Court of Justice in *Barry Brothers* did not stop at considering the objectively “hard-core” nature of the restraints that the BIDS deal entailed¹⁵³ but preferred to conduct a close scrutiny of its individual clauses against their legal and economic context before concluding that the arrangement, both as a whole and in its individual parts, had restricted competition ‘by object’.¹⁵⁴

Consequently, it is suggested that the pattern of analysis applied in *Barry Brothers* could be read as an attempt to extend some aspects of the more “economics-guided” approach to the concept of restriction of competition elaborated in ‘by effect’ cases to more serious, ‘by object’ infringements of Article 101(1)¹⁵⁵ and especially to take into account parameters that had hitherto been relevant for the application of the legal exception contained in Article 101(3) TFEU.¹⁵⁶ Thus, in relation, for instance, to the legal appraisal of the clauses imposing a compensation fee and limiting the parties’ freedom to dispose of the “decommissioned” plants the Court emphasised that the arrangement would, for the purpose of reducing overcapacity, have resulted in the market being “sealed off” to external rivals and in the market shares being de facto ‘frozen’ for a significant length of time.¹⁵⁷ That conclusion, taken together with the scope of the arrangement, which affected 90% of the existing competitors, led the Court of Justice to declare the BIDS agreement unlawful by reason of its object.¹⁵⁸

In light of the above analysis it is submitted that in *Barry Brothers* the Court of Justice confirmed the bifurcated structure of Article 101 TFEU and as a result the relevance of “industrial policy” goals only for the purpose of applying the legal exception of paragraph 3. However, it engaged in a thorough analysis of the BIDS agreement and focused on the gravity of the BIDS agreement and especially on the question of whether any anti-competitive effects could be “presumed” due to the seriousness of the infringements or, instead, should have been specifically investigated.¹⁵⁹ It is acknowledged that this scrutiny is not entirely “new” to the EU

¹⁵¹ See case T-374-375/94, *ENS v Commission*, [1998] ECR II-3141, para. 136; for commentary, see ODUDU, *The boundaries of EC Competition law: the scope of Article 81*, 2006: OUP, p. 113-114.

¹⁵² Cf. *National Society of Professional Engineers v US*, 435 US 679 at 692; also *Board of Trade of the City of Chicago v US*, 246 US 231 at 244; for commentary, JONES, above fn. 95, pp. 760-761. For commentary, *inter alia*, LEMLEY and LESLEY, “Categorical analysis in Antitrust jurisprudence”, J.M. Olin Program in Law and Economics, Stanford Law School, Working Paper No 348, Nov. 2007, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026967, pp. 7-8. Cf. Case T-17/93, *Matra Hachette v Commission*, [1994] ECR II-595, para. 85, 109-110; for commentary, *inter alia*, WHISH, above fn. 8, pp. 125-126.

¹⁵³ See case T-374-75, 384 and 388/94, *European Night Services and others v Commission*, [1998] ECR II-3141, para. 136; also case C-209/07, above fn. 1, para. 21.

¹⁵⁴ *Id.*, para. 37-39.

¹⁵⁵ Case C-209/07, above fn. 1, per AG Trstenjak, para. 52-54.

¹⁵⁶ *Id.*, para. 36-38 of the judgment. Cf. para. 36-41 with case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 156-160.

¹⁵⁷ See case C-209/07, above fn. 1, e.g. para. 32, 35-36.

¹⁵⁸ See, *inter alia*, *id.*, para. 36-39; cf., *mutatis mutandis*, Commission decision 84/380/EEC, *Synthetic Fibres*, [1984] OJ L207/17, para. 43-44.

¹⁵⁹ Case C-209/07, above fn. 1, para. 14-15, 16-17.

Courts.¹⁶⁰ However, it is suggested that in the preliminary ruling the Court of Justice “went a step beyond” its existing case law by emphasising the need to analyse the BIDS agreement against the very structure of the market and especially against the degree of concentration that characterised it, and to appraise its consequences for foreclosure as well as for current and future market shares.¹⁶¹ It is therefore concluded that *Barry Brothers*, despite being largely inspired by an orthodox view of Article 101 TFEU, is clearly rooted in the “flexible” and “in-context” approach that had hitherto mainly been applied to ‘by effect’ cases.¹⁶² However, what is its impact on the current and future interpretation of Article 101(1) TFEU? This question will be addressed in the following section.

4.2. A more “economics-based” approach to “serious” breaches of competition: from “literal dichotomy” to “continuum” between ‘by object’ and ‘by effect’ restraints?

The previous section examined the approach to ‘by object’ breaches of Article 101(1) TFEU adopted in *Barry Brothers* and discussed it against the wider context of the recent case law regarding “less serious” restrictions of competition. It was illustrated that the Court of Justice engaged in a very detailed analysis of the content and objectives of the BIDS agreement against its legal and economic context and in particular against the actual market conditions.¹⁶³ However, it was also pointed out that the Court adopted an approach resembling many of the features of the legal standard applicable to less serious infringements and encompassing aspects that in past cases had been relevant for the application of Article 101(3).

It may be queried how we can “reconstruct” the Court’s approach to the prohibition clause. Should we still regard it as a “categorical” one, as a result of which, once a *prima facie* infringement has been found to fall in the ‘by object’ “box”, it will be presumed to have anti-competitive effects?¹⁶⁴ Or would it be preferable to consider the Court of Justice’s current approach as one akin to the idea of “continuum”, as a result of which the type of assessment should be framed in light of the practice’s nature and inherent seriousness as well as the inherent features of the market?¹⁶⁵

It should be emphasised that according to the Court of Justice the need to assess *prima facie* Article 101(1) infringements in their legal and economic context would not be limited to specific categories of agreements but covered any practice suspected of being anti-competitive.¹⁶⁶ Consequently, it could be argued that, at least in its “initial stages” the analysis would be the same for all types of anti-competitive arrangements, since it would concentrate on their “content and purpose”: if the latter are so pernicious that they are almost inevitably likely to harm consumer welfare, they will be caught by the prohibition clause without the need to conduct an autonomous inquiry into their actual impact on competition in the relevant market.¹⁶⁷

¹⁶⁰ Case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 74-75; see also case 56/65, *STM v MBU*, [1966] ECR 235, p. 248; also, *mutatis mutandis*, case C-209/07, *Barry Brothers*, above fn. 1, per AG Trstenjak, para. 48-49.

¹⁶¹ Case C-209/07, *Barry Brothers*, above fn. 1, para. 36-39.

¹⁶² *Id.*, para. 37-38; see also AG Opinion, para. 83-93; for commentary, see ODUDU, “Restriction of competition by object—what is the beef?”, (2008) *Comp Law* 11 at 13.

¹⁶³ Case C-209/07, *Barry Brothers*, above fn. 1, para. 31 *et seq.*

¹⁶⁴ Case T-374/94, *ENS v Commission*, [1998] ECR II-3141, para. 136. For commentary, see WHISH, above fn. 8, p. 118.

¹⁶⁵ See e.g. *California Dental Association v FTC*, 526 US 756 at 780-781; for commentary, inter alia, LEMLEY and LESLEY, “Categorical analysis in Antitrust jurisprudence”, J.M. Olin Program in Law and Economics, Stanford Law School, Working Paper No 348, Nov. 2007, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026967, pp. 9-10.

¹⁶⁶ See e.g. case C-551/03, *General Motors v Commission*, [2006] ECR I-3173, para. 64, 66.

¹⁶⁷ *Inter alia*, case 56/65, *STM v MBU*, [1966] ECR 235 at 249; also case C-209/07, above fn. 1, para. 15.

However, if this ‘initial inquiry’ does not reveal such nefarious features, ‘the lawfulness of an agreement (...) must be tested according to its anti-competitive effects’ and the practice will only be prohibited if it can be shown that competition has been distorted as a result of it.¹⁶⁸

Against this background, it is argued that the Court has moved away from a strictly “literal” and “categorical” approach to Article 101(1) and toward a legal standard for analysing the content and purpose of any agreement, that focuses more on their inherent seriousness rather than on their “formal” characteristics.¹⁶⁹ In accordance with the standard applied in *Barry Brothers*, the decisive question would be whether its “content and purpose” is compatible with the objectives of Article 101 TFEU, i.e. economic efficiency for the purpose of promoting consumer welfare, and not whether they belong to a relatively formalistic category, as *European Night Services*, for instance, could have suggested.¹⁷⁰

Or, to put it in a different way, it could be argued that, in accordance with the analysis employed in *Barry Brothers*, as one “moves along” the imaginary continuing line existing between “more serious” and “less obvious” prima facie infringements, the applicable type of inquiry would have different features. If the content and purpose of an individual agreement appear to be in conflict with the very function of Article 101(1) TFEU the prohibition clause ‘can be applied absent measured inefficiency or inefficiency predicted using economic tools’ and on the basis of an assumption that, according to ‘sufficient experience of particular conduct and of its impact’ that agreement is likely to lead to damage to competition.¹⁷¹ If, instead, the outcome of the inquiry as to the content and purpose of a practice does not reveal such degree of seriousness as to warrant antitrust intervention without assessing its actual economic consequences, then it will be necessary to test its actual impact on competition and especially whether the latter has been distorted.¹⁷²

On this point, a parallel, albeit not a perfect one,¹⁷³ can be drawn with the US Supreme Court’s decisions in *NCAA v Board of Regents of the University of Oklahoma*¹⁷⁴ and in *California Dental Association v FTC*.¹⁷⁵ In *NCAA*, the Court held that there was no ‘bright line separating ‘per se’ from rule of reason inquiry’¹⁷⁶ and explained that whether ‘the ultimate finding [was] the product of a presumption or [of] actual market analysis’¹⁷⁷ constituted the expression of the same type of appraisal which will focus on the ‘competitive significance of the restraint’ and especially on its ability to suppress or promote competition.¹⁷⁸ It was added in *California Dental* that in conducting this type of scrutiny the judge would have, in substance, to

¹⁶⁸ WHISH, above fn. 8, p. 118; see e.g. case 56/65, *STM v MBU*, [1966] ECR 235 at 249.

¹⁶⁹ Per AG Trstenjak, para. 50; see also para. 80-81 and para. 23 of the judgment. Cf. case T-374/94, *ENS v Commission*, [1998] ECR II-3141, para. 136. For commentary, see ODUDU, above fn. 162, p. 15; also WHISH, above fn. 8, p. 140.

¹⁷⁰ Case T-374-75, 384 and 388/94, *European Night Services and others v Commission*, [1998] ECR II-3141, para. 136.

¹⁷¹ ODUDU, *The boundaries of EC Competition law: the scope of Article 81*, 2006: OUP, p. 113-114.

¹⁷² *Inter alia*, WHISH, above fn. 8, p. 118; see e.g. case 56/65, above fn. 168, p. 249.

¹⁷³ See e.g. Commission decision 2004/1307 of 7 April 2004, *Societe Air France/Alitalia S.p.A.*, available at: <http://ec.europa.eu/competition/antitrust/cases/decisions/38284/en.pdf>, especially para. 132-137 and 154-162; Case T-17/93, *Matra Hachette v Commission*, [1994] ECR II-595, para. 85; also case T-374/94, *ENS v Commission*, [1998] ECR II-3141, especially paras. 135-137; case C-209/07, above fn 1, see e.g. para. 39 of the judgment and para. 51-54, 56-58 of the AG Opinion. For commentary, see e.g. JONES, above fn. 95, p. 750-751; WHISH, above fn. 8, p. 118-119.

¹⁷⁴ 468 US 85.

¹⁷⁵ 526 US 756.

¹⁷⁶ *NCAA v Board of Regents of the University of Oklahoma*, 468 US 85 at 104, fn. 26.

¹⁷⁷ *Id.*, p. 104.

¹⁷⁸ *Ibid.*

‘frame’ a standard of review that she regarded as ‘suitable’ to the case before her, in light of the ‘circumstances, details and logic’ of the alleged infringement.¹⁷⁹

The Supreme Court held that since ‘no categorical line’ could be traced between ‘intuitively anti-competitive’ practices and those whose negative effects on rivalry are ‘less obvious’,¹⁸⁰ ‘what [was] required (...) [would be] an enquiry meet for the case’ considering, respectively, ‘whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look in place of a more sedulous one.’¹⁸¹

In light of the above analysis, it is argued that the Court of Justice, in a way which was not dissimilar from the US Supreme Court in *NCAA* and *California Dental*, has come to acknowledge the existence of a continuum in its analysis of the content and purpose of individual prima facie restrictive practices. This appraisal would concentrate on the seriousness of each arrangement in its actual context and would attach different legal consequences to different degrees of gravity of the infringement: the more serious the prima facie breach is, the more likely it will be for it to have anti-competitive effects and, consequently, to justify ‘early antitrust intervention’ by way of the application of a presumption of anti-competitive impact. If, instead, a practice is not obviously “dangerous” for genuine competition, it will be necessary to consider its actual effects on the market: in these cases, “early intervention” would therefore not be justified.¹⁸² However, the adoption of a more “flexible” and “economics-based” approach to the prohibition clause raises issues for the scope of the Article 101(3) and especially for the extent to which the changes in the interpretation of Article 101(1) may have an impact on the scope of application of the legal exception. This question will be addressed in the next section.

4.3. From “dichotomy” to “continuum” in the interpretation of Article 101(1) TFEU: what are the implications for the legal exception of Article 101(3)?

Section 4.2 tried to gauge the impact of *Barry Brothers* on the interpretation of Article 101(1) TFEU. This section will attempt to analyse some of the consequences of the decision for the legal assessment entailed by the legal exception of Article 101(3) TFEU and applicable to arrangements that have been found to be anti-competitive following the suggested “continuum” appraisal.¹⁸³ It was illustrated that at least up to the *Metropole* judgment¹⁸⁴ whereas the legal analysis to be conducted under the prohibition clause is only limited to ascertaining whether an arrangement constitutes a restriction of competition either by reason of its ‘object’ or in view of its ‘effects’,¹⁸⁵ the function of the four conditions for the application of the legal exception would be to gauge the extent to which the practice, despite its harmfulness, nonetheless enhances the competitive process.¹⁸⁶ Gains in terms of ‘allocative’ as well as of ‘productive’ efficiency would have to be taken into account and ‘weighed in’ against its anti-competitive effects.¹⁸⁷

¹⁷⁹ *California Dental Association v FTC*, 526 US 756 at 780.

¹⁸⁰ *Id.*, p. 781.

¹⁸¹ *Ibid.*

¹⁸² See, *mutatis mutandis*, ODUDU, above fn. 171, pp. 118-121 and 157.

¹⁸³ See e.g. Commission decision 2004/1307 of 7 April 2004, *Societe Air France/Alitalia S.p.A.*, available at: <http://ec.europa.eu/competition/antitrust/cases/decisions/38284/en.pdf>. Cf. case T-328/03, *O2 v Commission*, [2006] ECR II-1231, especially para. 69-73. More recently, see case C-209/07, above fn. 1, see e.g. para. 34, 37-38; see also AG Opinion, para. 83-93; for commentary, *inter alia*, ODUDU, above fn. 162, p. 13.

¹⁸⁴ See e.g. case T-112/99, *Metropole and others v Commission*, [2001] ECR II-2459, para. 74-79.

¹⁸⁵ See MANZINI, “The European rule of reason—crossing the sea of doubt”, (2002) 23(8) *ECLR* 392 at 396-397.

¹⁸⁶ See e.g. case 56/64, *Consten and Grundig v Commission*, [1966] ECR 429, pp. 472-473; see also Article 81(3) Guidelines, para. 13, 17-18. For commentary, see e.g. MANZINI, above fn. 185, pp. 395-396.

¹⁸⁷ *Ibid.*; see also Article 81(3) Guidelines, para. 13, 17-18.

This interpretation was, however, widely criticised.¹⁸⁸ Commentators argued that the subject matter of the inquiry enshrined in the prohibition differed from that provided in the legal exception: whereas paragraph 1 should concentrated on the existence of a “restriction of competition” and should therefore focus on the question of whether a given practice had adversely affected allocative efficiency and thereby consumer welfare, paragraph 3 should seek to capture any positive effects for productive efficiency that could be ‘passed on’ to consumers without substantially impairing the remaining competition.¹⁸⁹ Accordingly, other authors suggested that the more “economics-principled” appraisal conducted under Article 101(1)¹⁹⁰ would not impinge upon the applicability of the legal exception. It would only ensure that only those agreements that are clearly incompatible with ‘competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources’¹⁹¹ would be prohibited and as a result that Article 101(3) TFEU was only applicable to those cases in which the “balancing” of anti- and pro-competitive effects is actually required.¹⁹²

However, although this interpretation is very attractive, it does not seem to be able to “tell the whole story” about the actual application of the legal exception. It is recalled from section 2 that Article 101(3) has been employed to pursue objectives that are not strictly of an “economic” nature.¹⁹³ For instance, in *CECED* the Commission granted an exemption for an arrangement under which a number of domestic appliances’ producers had agreed to jointly phasing out the production of energy inefficient washing machines on the ground that reducing the supply of more energy intensive appliances would have allowed manufacturers to concentrate on more energy efficient products, with clear gains in terms of overall productive efficiency and with clear benefits for consumers in the form of less energy consumption as well as less environmental pollution.¹⁹⁴ Commenting on this decision, Townley argued that ‘environmental protection’, rather than economic efficiency, was ‘the (...) inspiration’ for the decision,¹⁹⁵ although the Commission had been very careful in its attempt to ‘cloak environmental criteria in economic language’¹⁹⁶ to “fit” them within the framework of paragraph 3.¹⁹⁷

In the light of the above discussion, a question arises as to what function Article 101(3) TFEU should fulfil in individual cases: should its remit be limited to a productive efficiency inquiry? Or should it instead play the role of ‘public policy exception’ to the application of the sanction of nullity? It was argued in section 4.2 that the prohibition clause, far from being “fashioned around” the formalistic dichotomy between by object and by effect infringements,¹⁹⁸ seems now to be evolving toward a “continuum” between “nefarious” breaches and “less obvious” restrictions of competition, as a result of which the type of inquiry as to its impact on the market—i.e. whether anti-competitive effects should only be presumed or would have to be

¹⁸⁸ See e.g. ODUDU, above fn 171, pp. 157-158; also NAZZINI, “Article 81 between time present and time past: a normative critique of ‘restriction of competition’ in EU law”, (2006) 43(2) *CMLRev* 497 at 504-505.

¹⁸⁹ ODUDU, above fn. 171, pp. 102 et seq.; see also pp. 128-131.

¹⁹⁰ MARQUIS, “O2 (Germany) and the exotic mysteries of Article 81”, (2007) 32(1) *ELRev* 29 at 37.

¹⁹¹ Commission Article 81(3) Guidelines, para. 13; for commentary, see NAZZINI, above fn. 188., p. 520; also ODUDU, “A new economic approach to Article 81(1)?”, (2002) 27(1) *ELRev* 100 at p. 103-104.

¹⁹² See ODUDU, above fn. 171, pp. 157-158. Also NAZZINI, “Article 81 between time present and time past: a normative critique of ‘restriction of competition’ in EU law”, (2006) 43(2) *CMLRev* 497 at 504-505, 519.

¹⁹³ See, *inter alia*, case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751, para. 54.

¹⁹⁴ Commission decision 2000/475/EEC of 24 January 1999, *CECED*, [2000] OJ L187/47 at para. 47-54.

¹⁹⁵ TOWNLEY, above fn. 101, p. 152.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Id.*, p. 149-50; see also WHISH, above fn. 8, pp. 153-154; ODUDU, above fn. 171, pp. 102 et seq.; see also pp. 128-131. See e.g., *mutatis mutandis*, case C-309/99, *Wouters v Algemene Raad*, [2002] ECR I-1577, per AG Leger, para. 104 (in relation to the remit of Article 101(1)).

¹⁹⁸ See e.g. case T-374/94, *ENS v Commission*, [1998] ECR II-3141, para. 135-137.

actually demonstrated, in accordance with a counterfactual analysis—and therefore its (il)legality would have to be determined.¹⁹⁹

It is therefore argued that when an infringement is not among the “hard-core” restraints, such as price fixing, the role of the legal exception would have to be limited to an inquiry of the extent to which the practice furthers productive efficiency²⁰⁰ and/or seeks to achieve specific public policy goals.²⁰¹ It was suggested that especially after O2, which affirmed the applicability of a counterfactual analysis to “less serious” restrictive practices, a limited degree of ‘balancing’ of their positive against their negative effects would be required to determine whether a restriction on competition had actually occurred.²⁰² Consequently, it is submitted that in these cases the remit of the legal exception’s four conditions would be confined to capturing the benefits of individual practices to, e.g. technological advancement or to the Treaty’s ultimate goals, even those of a less obviously “economic” nature.²⁰³

By contrast, when after the examination of its ‘content and purpose’²⁰⁴ it is found that the practice constitutes a serious breach of Article 101(1) TFEU, the assessment required by Article 101(3) would have to cover a wider range of issues. It is argued that in these cases the legal exception would not only retain its function of productive efficiency and ‘public policy exception’, but also provide a forum within which to appraise any allocative efficiency benefits in light of the four conditions of Article 101(3) TFEU.²⁰⁵ Accordingly, it is suggested that the inquiry required for the application of the legal exception to more serious infringements would have to be wider than for less obvious restraints on competition, in as much as it would encompass any inquiry as to the “gains” arising from the agreement itself, ranging from considerations of allocative efficiency to gains in technical advancements to, eventually, allegations that the practice in issue had pursued public policy objectives.²⁰⁶

It could be argued that adopting this view of the scope of the assessment required by Article 101(3) TFEU for, respectively, “less obvious” and “hard-core” *prima facie* infringements does not appear entirely consistent with the idea of “continuum” which, it was suggested, seems to inform, at least in part, the interpretation of the prohibition clause, especially after more recent decisions of the Court of Justice.²⁰⁷ It is therefore suggested that the pattern of analysis advocated for the application of the legal exception would sit uncomfortably with that adopted for the application of Article 101(1) TFEU since it would entail, respectively, a “more penetrating” inquiry for hard-core infringements and a somehow less extensive appraisal for less serious suspected breaches. However, it could be argued that this different and apparently partly contradictory “logic” may be justified in light of the existing principles governing the application of the legal exception. It was noted in earlier sections that according to the case law of the EU Courts and to the practice of the Commission, a very exhaustive examination would have to be

¹⁹⁹ *Inter alia*, case C-209/07, above fn. 1, see e.g. para. 34, 37-38.

²⁰⁰ See ODUDU, above fn. 171, pp. 137 et seq.

²⁰¹ See TOWNLEY, above fn. 101, pp. 148-152; see e.g. Commission decision 2000/475/EC of 24 January 1999, *CECED*, [2000] OJ C47, especially para. 47-51.

²⁰² See e.g. MARQUIS, “O2 (Germany) and the exotic mysteries of Article 81”, (2007) 32(1) *ELRev* 29 at 42-44.

²⁰³ Cf. case T-328/03, *O2 v Commission*, [2006] ECR II-1231, especially para. 40 et seq., with Commission Article 81(3) Guidelines, para. 11-13; for commentary, see JONES, above fn. 95, pp. 804-805.

²⁰⁴ See especially case C-209/07, above fn. 1, per AG Trstenjak, para. 51-54.

²⁰⁵ See e.g. Article 81(3) Guidelines, para. 32-34.

²⁰⁶ See e.g. Article 81(3) Guidelines, para. 32-35, 46-47; also case C-209/07, above fn.1, per AG Trstenjak, para. 56-57; *Competition Authority v Beef Industry Development Society and others*, judgment of 3 November 2009, [2009] IESC per Kearns J, part (b); see also concurring judgment of Fennelly J, para. 3 and 7.

²⁰⁷ See especially case C-209/07, above fn.1, para. 15-17, 21, 36-38. See also, *mutatis mutandis*, case T-328/03, *O2 v Commission*, [2006] ECR II-1231, especially para. 65 et seq. *Supra*, section 4.2, fn. 229 and accompanying text.

conducted before deciding if “hard core” infringements could nonetheless benefit from the application of Article 101(3) TFEU.²⁰⁸

Accordingly, it is submitted that applying a more extensive inquiry to these “more serious breaches” would be consistent with the existing case law, according to which a particularly ‘pressing justification’ would have to be provided before applying the legal exception to “serious infringements” of Article 101(1).²⁰⁹ Having regard, instead, to the type of appraisal proposed for “less obvious” *prima facie* infringements, it is suggested that an inquiry limited to the extent to which the latter pursued specifically “public policy” and productive efficiency-related objectives would similarly be justified by the nature of the assessment carried out already under Article 101(1) TFEU. It is argued that not only would these “less serious” *prima facie* breaches be subjected to a pervasive inquiry as to their content and purpose and especially to the actual impact that they have on competition for the purpose of the application of the prohibition clause; they would also be less likely to be inconsistent with the objectives pursued by the EU Treaty’s antitrust rules by reason of their less damaging content.²¹⁰

It is concluded that the evolving interpretation of the prohibition clause appears to have partly altered the overall structure of Article 101, including the type of inquiry entailed by the legal exception. It is suggested that the nature of the infringement and the “place” in which the latter can be positioned along the “continuing line” between more and less serious infringements is likely to determine how wide ranging the inquiry for the purpose of applying the legal exception is going to be—i.e. whether it should take into account the extent to which competition was enhanced as a result of (or perhaps despite) a “serious” antitrust breach or should instead be limited to productive efficiency issues, as with ‘by effects’ cases, that are analysed in accordance with the counterfactual pattern of analysis.²¹¹

5. Between “orthodoxy” and a more “economics-based” approach: how is the Court of Justice shaping the interpretation of Article 101 EU Treaty? Tentative conclusions

It is beyond doubt that the application of Article 101 EU Treaty has undergone major changes in the past decade or so, all of which have shaped the manner in which the provision is applied. In this respect, a continuing theme appears to underscore this discussion, namely the need to ground the application of Article 101 EU Treaty in sound economics to minimise decision-making errors and to secure legal certainty, clarity and predictability.²¹² This paper examined the implications of the recent *Barry Brothers* preliminary ruling both for the application of the EU antitrust rules to “crisis cartels” and for the ongoing development of the approach to Article 101 EU Treaty. It was argued that while the Court of Justice’s decision was not totally surprising, given the seriousness of the restraints that the BIDS agreement entailed, it sends out a strong

²⁰⁸ *Supra*, section 2.3, fn. 89 and accompanying text. See e.g. Commission decision 2000/475/EC of 24 January 1999, *CECED*, [2000] OJ C47, especially para. 47-51; also Commission decision 94/296/EC of 29 April 1994—*Stichting Baaksten* (IV/34.456), [1994] OJ L131/15, especially paras. 32 *et seq.*

²⁰⁹ See, *inter alia*, Commission Decision 2002/914/EC, *VISA International/Multilateral Exchange Fee*, [2001] OJ L318/17, especially para. 74 *et seq.*

²¹⁰ See e.g. case 56/65, *STM v MBU*, [1966] ECR 337 at 249250; case C-234/89, *Delimitis v Henninger Brau*, [1991] ECR I-935, para. 10-12, 14-15; cf. e.g. case T-65/98, *Van den Bergh v Commission*, [2003] ECR II-4653, para. 83-84, 106-107.

²¹¹ See e.g. case T-328/03, *O2 v Commission*, [2006] ECR II-1231, especially para. 65 *et seq.*; for commentary see *inter alia* MANZINI, “The European rule of reason—crossing the sea of doubt”, (2002) 23(8) *ECLR* 392 at 396-397; also MARQUIS, “O2 (Germany) and the exotic mysteries of Article 81”, (2007) 32(1) *ELRev* 29 at 42-44; JONES, above fn. 95, pp. 780 *et seq.*

²¹² See *inter alia* VENIT, “Brave new world—the modernisation and decentralisation of enforcement under Articles 81 and 82 EC Treaty”, (2003) 40(3) *CMLRev* 545, especially pp. 569 *et seq.*

warning call for those companies wishing to rely on similar arrangements to tackle the economic downturn in their industry.²¹³

Thereafter, the paper attempted to gauge some of the overall implications of the *Barry Brothers* decision for the approach to the interpretation of Article 101(1) of the Treaty. It was illustrated how the Court of Justice adopted a very “orthodox” reading of the “bifurcated” structure of Article 101 TFEU, taken as a whole, as well as, in the context of the prohibition clause, of the concept of “restriction of competition”. In that respect, however, the Court emphasised the need to undertake an “in-context” analysis of the *prima facie* anti-competitive practices, even when they entailed “hard-core” restraints. Consequently, another, more general question emerged, namely whether this ruling could be reconciled with the existing and relatively controversial case law concerning the legal appraisal of restrictions of competition ‘by effect’. It was argued that the application of a “counterfactual analysis” to less serious anti-competitive practices would ensure that only those restraints having an actual adverse impact on competition within the relevant market would be prohibited by the EU antitrust rules. Or, to put it in a slightly different way, it was suggested that the prohibition clause appears to have been applied to catch only these practices that entail a “real” restriction of competition, after a careful, in-context and economics-based appraisal.

The paper briefly examined the more recent developments in the interpretation of Section 1 of the US Sherman Act and relied on that examination to provide a background against which to reflect on how the apparently “orthodox” approach to ‘by object’ infringements can be reconciled with the counterfactual analysis emerging for less obvious breaches. It was argued that the Court of Justice of the EU appears to have embraced a concept of “restriction of competition” as a ‘spectrum’ ranging from more to less serious competition infringements²¹⁴ and therefore to have moved away from a “stark” distinction between ‘by object’ and ‘by effect’ breaches.²¹⁵ It was acknowledged that this parallel could not be “perfect”, due to the significant differences existing between Article 101 TFEU and the US antitrust rules. However, the paper respectfully suggested that the interpretation emerging from the Court of Justice’s recent judgments resembles the position adopted by the US Supreme Court in its *California Dental Association* decision, in which the Court had distanced itself from a neat distinction between ‘per se’ and ‘rule of reason’ infringements to adopt the view that the scope of Section 1 should encompass a “continuum”, as a result of which the type of inquiry for each practice would have to be determined in light of its nature and seriousness.²¹⁶

It is concluded that the Court of Justice seems to be no longer “straitjacketed” by an apparently “literal approach” to Article 101(1) TFEU or indeed by the limits of the ongoing debate on whether any of the elements of a “standard of reason” should be incorporated in the application of the Treaty competition rules.²¹⁷ Instead, the more recent decisions can be understood as suggesting a strong commitment to uphold an “in-context” and economics-based interpretation of the prohibition clause and, hence, to a “modernised” reading of Article 101 TFEU.

²¹³ SVETLICINII, “ECJ’s ruling in beef industry case: competition law must be observed at all times”, (2008) 12 *Eur. L. Reporter* 402 at 407.

²¹⁴ E.g. case T-328/03, *O2 v Commission*, [2006] ECR II-1231, para. 65-66; also case C-209/07, above fn. 1, para. 15-16.

²¹⁵ Case T-374/94, *European Night Services and others v Commission*, [1998] ECR II-3141, para. 135-137.

²¹⁶ *California Dental Association v FTC*, 526 US 756 at 779-781.

²¹⁷ Case C-209/07, above fn. 1, para. 15-16; see also AG Opinion, especially para. 48-49.